

W. H. Hake

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

: CHAPTER 13

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: CASE NO. 10-13276-WHD

: ADVERSARY PROCEEDING  
: NO. 11-01051

Before the Court is the Motion to Reconsider the Court's Final Order Resolving the Adversary Proceeding filed by Delta Community Credit Union (hereinafter the "Defendant"). Michael and Denise Moore (hereinafter the "Plaintiffs") oppose the Motion. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(O);

### **FACTS AND PROCEDURAL HISTORY**

The Court set for hearing a valuation of the Plaintiffs' property. After two resets, the final hearing date was set on the Court's electronic docket for January 26, 2012 at 2:00 p.m. Counsel for the Defendant failed to attend the hearing, arriving after its conclusion. Hearing no opposition to the Plaintiffs' evidence, the Court granted the relief sought in the Plaintiffs' complaint. *See* Order dated January 27, 2012. Defendant filed the instant Motion, asking the Court to reconsider the January 27th Order under Bankruptcy Rule 9024 based on 1) unintentional misrepresentation by Plaintiffs' counsel, and 2) excusable neglect by Defendant's counsel.

In the Motion to Reconsider, Defendant argues that Plaintiffs' counsel unintentionally misrepresented the time set for the hearing to be 2:30 p.m. Accompanying the Brief in Support of the Motion, Defendant attached email correspondence from Plaintiffs' counsel to Defendant's counsel and the Court's staff. In the email dated January 20th, Plaintiffs' counsel states the desire to go forward with the January 26th hearing but, also, mentions the possibility of a reset. In a second email, dated January 23rd, Plaintiffs' counsel informed the Court and Defendant's counsel that Plaintiffs were "able to proceed with the hearing Thursday at 2:30." *See* Attachment 2 for Exhibit B to Defendant's Brief in Support. Defendant's counsel responded, confirming his attendance at the hearing. Defendant argues that, in light of the two previous resets, the emails from Plaintiffs' counsel led Defendant's counsel to disregard the case docket and to believe the hearing was reset to 2:30 p.m.

Defendant also argues that the motion to reconsider should be granted due to Defendant's excusable neglect. Defendant states that no other party will be prejudiced by a second hearing, the

delay is minimal, the impact on judicial proceedings is negligible, and the mistake was due to a good faith belief that the hearing was reset. In its response, Plaintiffs argue that excusable neglect is not present and that Defendant's counsel should have followed the electronic case docket, which clearly stated 2:00 p.m. as the time for the hearing. Plaintiffs also believe that, if the Motion to Reconsider is granted, Plaintiffs will be prejudiced by a delayed confirmation and an inability to avoid Defendant's lien. Plaintiffs did affirm the emails presented by Defendant and, also, stated that, following the two afore-mentioned emails, Plaintiffs' counsel sent another email to the Court but not to Defendant's counsel, asking the Court to clarify the time set for the hearing. The Court's staff responded, stating that the hearing was set for 2:00 p.m.

### **CONCLUSIONS OF LAW**

Under Rule 9024 of the Federal Rules of Bankruptcy Procedure, a court "on motion and just terms . . . may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party . . .". FED. R. BANKR. P. 9024 (applying Rule 60 of the Federal Rules of Civil Procedure to bankruptcy proceedings).<sup>1</sup>

To find excusable neglect under Rule 60(b)(1), a court must utilize its powers of equity, taking into account all relevant circumstances regarding the party's omission, including: 1) the danger of prejudice to the other parties; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was in the reasonable control of the movant; and 4) whether the movant acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick*

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Due to the Court's holding, the Court will not address whether 60(b)(3) is applicable.

*Assocs. Ltd. P'ship*, 507 U.S. 380, 395-6 (1993). Further, a court should strive to render judgment on the merits of a case, after the case has been fully heard. *See Montero v. Potter*, 174 Fed. Appx. 489, 490-91 (11th Cir. 2006).

In this case, the Court does in no way condone the actions of Defendant's counsel in failing to appear and failing to check the case docket. However, even though the circumstances of a failed appearance are within a party's control, the Court believes that this case is analogous to cases in which the Eleventh Circuit Court of Appeals found "excusable neglect" based on mistake of fact. The Court recognizes a "material distinction between an attorney's mistake of law and a mistake of fact." *U.S. v. Davenport*, No. 11-10743, 2012 WL 335678, at \*6 (11th Cir. Feb. 3, 2012). The Court has categorically declined to find "excusable neglect" in mistake of law situations when an attorney failed to understand or review the stated law or misunderstood the procedural law. *See Advanced Estimating System, Inc. v. Riney*, 130 F.3d 997, 997-99 (11th Cir. 1997) (refusing to find "excusable neglect" where the attorney missed a deadline to file a notice of appeal due to a failure to file post-trial motions in the time required, which prevented the tolling of the time to file a notice of appeal); *In re Bucciarelli*, 2010 Bankr. LEXIS 1543 (Bankr. N.D. Ga. April 28, 2010)(Drake, J.). A mistake of fact, however, such as a miscommunication or a clerical error, may constitute "excusable neglect" if the pertinent factors exist. *Davenport*, at \*6; *see also Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996). For example, in *Cheney*, the court reversed the lower court and found excusable neglect where a party's attorney filed a demand for a trial *de novo* six days late. *Cheney*, 71 F.3d at 850. Apparently, the movant's lead attorney and associate attorney miscommunicated, each believing the other filed the motion by the deadline. The Court reasoned that the omission was a result of counsel's negligence and not bad faith, the other party suffered little prejudice by the omission, and the court's resources would not be adversely

impacted by a trial. *Id.* at 849.

Here, taking into account all relevant circumstances, the Court believes reconsideration is appropriate in this case. As counsel in *Cheney* was responsible for filing a motion by the deadline, counsel for Defendant was responsible for determining the time set for the hearing and appearing on time. However, similar to counsel's simple omission in *Cheney*, Defendant's counsel's failure to appear was the result of a negligent failure to verify the time indicated by opposing counsel. Any prejudice to the Plaintiffs for money expended on the first hearing will be negated by this Order, which will be conditioned upon Defendant's payment of fees and expenses to the Plaintiffs. Furthermore, the Plaintiffs will still be able to state their arguments and put on evidence before the Court, allowing the Court to make a determination on the merits.

Any delay in confirmation is negligible in light of the multiple resets which have already occurred at the Debtor's insistence. Like *Cheney*, where the movant filed soon after realizing its mistake, Defendant's counsel filed the motion on the same day as the missed hearing, resulting in a limited delay. The missed hearing did waste fifteen minutes of the Court's time, unlike in *Cheney* where the conduct resulted in no waste. However, unlike in *Cheney*, where a party's attorneys miscommunicated with one another, Defendant's counsel was misled, to an extent, by the opposing counsel. Plaintiffs' counsel stated the wrong time in an email, received a response affirming that time from Defendant's counsel, discovered the correct time, but did not correct the earlier statement made to Defendant's counsel. The Court believes that Defendant's counsel made a good faith mistake in misunderstanding the emails sent by Plaintiffs' counsel. Therefore, in light of the small prejudice to the opposing party, the small waste of judicial resources, the limited delay, and the good faith misunderstanding of the opposing counsel's emails, the Court believes that the failure to appear by Defendant's counsel resulted from excusable neglect.

Thus, it is hereby ordered and adjudged that Defendant's Motion for Reconsideration is **GRANTED**, conditioned upon Defendant's willingness to pay the fees and expenses that Plaintiff incurred as a result of the first hearing.

If Defendant chooses to avail itself of the opportunity for a new trial and is willing to comply with the terms of this Order, Defendant shall file a request for a trial date.

**END OF DOCUMENT**